

- A **Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased**
B **dated 10 February 1971) & Ors**

- C HIGH COURT (IPOH) — CIVIL SUIT NO 22–111 OF 2001
HARMINDAR SINGH JC
31 JANUARY 2012

- D *Probate and Administration — Distribution of assets — Grant of probate — Application to set aside grant — Complaints against executors in discharge of their duties — Fraud and breach of trust — Whether plaintiffs proven fraud — Whether plaintiffs' claim time barred — Whether sale of two lots null and void — Limitation Act 1953 ss 6, 9 & 22*
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- F The plaintiffs in these proceedings are the legal wife of the late Panchanath a/l Ratnavale ('the deceased'), Annalakshmi, and his five children, who were all beneficiaries under the will of the deceased ('the will'). However, Annalakshmi passed away after the commencement of these proceedings and was substituted by her daughter, the fourth plaintiff. The first and second defendants, the younger brothers of the deceased, were the named executors and trustees under the will. The third and fourth defendants were at all material times the acquaintances of the first and second defendants. The subject matter of the
G plaintiffs' claims was five pieces of property located in Kedah ('the properties'), namely Lot 287, Lot 288, Lot 290, Lot 461 and Lot 3. The plaintiffs claimed that the grant of probate extracted by the first and second defendants ought to be set aside because it did not distribute the plaintiffs' shares as provided in the will. In short, the plaintiffs' claim against the first and second defendants was
H based on fraud and breach of trust. The plaintiffs further claimed that the third and fourth defendants were acting in collusion with the first and second defendants. Based on these causes of action the plaintiffs had sought, inter alia, relief in the form of monetary relief, an order to provide accounts, and an order to deliver up the title deeds to the properties. The defendants denied any fraud
I or breach of trust and instead claimed that they had administered the estate of the deceased, which was insolvent, to the best of their ability. The first and second defendants also relied on the defence of limitation and laches. The third and fourth defendants claimed that there was no collusion between them and the first and second defendants and that the plaintiffs' action against them was

time barred. The third defendant also claimed that she was a bona fide purchaser for value of Lots 290 and 431.

Held, dismissing the plaintiffs' claim except for one part with no order as to costs:

- (1) The instant actions filed in 1994 and 1995 concerned transactions which occurred in the 1970's. Thus the limitation periods specified in ss 6 and 9 of the Limitation Act 1953 ('the Act') had been exceeded. However, under s 22 of the Act, the rules of limitation would not protect any fraud or fraudulent breach of trust and the case where the trustees had come into possession of trust property. Considering the time periods in the instant action, the plaintiffs were clearly out of time for any action relating to trust property where there was no fraud and where the trust property was not with the trustees. Further, the third and fourth defendants were also exempted from liability under s 22(2) of the Act (see paras 18–19 & 22).
- (2) This court found that under the circumstances of this case, the plaintiff's claim for an order to provide accounts was barred by virtue of s 6(2) of the Act (see para 23).
- (3) The plaintiffs' allegations that the first and second defendants had colluded with the third and fourth defendants to sell lots 287 and 288 below the market value were without merit and should fail. The plaintiffs' contention that Lots 287 and 288 would be worth about RM100,000 each failed to take into account the many encumbrances including caveats lodged by various parties on the said lots. As such, the value of each lot would have been less and the sale transaction was not a sham. Further, the fact that the third and fourth defendants were close friends of the second defendant did not make them nominees or proxies in the absence of any proof of wrongdoing. There was also no evidence of collusion in the receipt of secret profits (see paras 35 & 44).
- (4) From the facts of this case it was clear that Lots 290 and 461 were beset with countless problems and taking into account all these factors it was found that the first and second defendant did not have an oblique motive in transferring these lots to the third defendant. The plaintiffs had alleged that the defendants had acted fraudulently but fraud was a serious matter that had to be proved beyond reasonable doubt. This court found that in all the circumstances, the plaintiffs had failed to prove allegations of fraud and breach of trust with regard to the transfer of Lots 290 and 461 and thus their claim in this regard could not succeed. However, the plaintiffs' claim that the sale and transfer of Lots 290 and 461 to the third defendant ought to be declared null and void because the transfer document was insufficient or void had merit. As the plaintiffs had adduced evidence that the registration of the said lots was obtained by

A means of a lapsed power of attorney this court was constrained to hold that the transfer of Lots 290 and 461 to the third defendant was done by means of an insufficient or void transfer and that such transfer and subsequent registration were therefore invalid. Accordingly, the sale and transfer of Lots 290 and 461 were declared null and void (see paras 54–55, 79 & 85).

B (5) The plaintiffs' claim that Lot 3 which had been ordered to be returned to the second defendant and which had been transferred to the second defendant as absolute owner rightfully belonged to the deceased's estate appeared to be farfetched. Even if Lot 3 formed part of the deceased's estate it would have remained forfeited to the government as the deceased had failed to pay the arrears of quit rent. In the circumstances, there were no merits in the plaintiffs' allegations in this regard and this claim should fail (see paras 58, 60–61).

C (6) Although the plaintiffs had made several allegations of monies received by the second defendant, which were not accounted for by the first and second defendants, they had failed to provide sufficient evidence of breach of trust or fraud to prove these allegations (see paras 62 & 66).

E **[Bahasa Malaysia summary]**

Plaintif-plaintif dalam prosiding tersebut adalah isteri sah kepada mendiang Panchanath a/l Ratnavale ('si mati'), Annalakshmi, dan lima orang anaknya, yang mana semua adalah benefisiari di bawah wasiat si mati ('wasiat tersebut'). Walau bagaimanapun, Annalakshmi, telah meninggal dunia selepas prosiding tersebut bermula dan telah digantikan oleh anak perempuannya, plaintiff keempat. Defendan-defendan pertama dan kedua, adik-adik lelaki si mati, telah dinamakan wasi-wasi dan pemegang-pemegang amanah di bawah wasiat tersebut. Defendan-defendan ketiga dan keempat adalah pada setiap masa matan kenalan defendan-defendan perama dan kedua. Perkara pokok tuntutan-tuntutan plaintiff-plaintif adalah lima keeping hartanah yang terletak di Kedah ('hartanah tersebut'), iaitu Lot 287, Lot 288, Lot 290, Lot 461 dan Lot 3. Plaintiff-plaintif mendakwa bahawa pemberian probet yang dikeluarkan oleh diekstrak oleh defendan-defendan pertama dan kedua patut diketepikan kerana ia tidak membahagikan saham-saham plaintiff-plaintif seperti mana dalam wasiat tersebut. Pendek kata, tuntutan plaintiff-plaintif terhadap defendan-defendan pertama dan kedua adalah berdasarkan fraud dan pelanggaran undang-undang amanah. Selanjutnya plaintiff-plaintif mendakwa bahawa defendan-defendan ketiga dan keempat telah bertindak seperti berpakat sulit dengan defendan-defendan pertama dan kedua. Berdasarkan kausa-kausa tindakan tersebut plaintiff-plaintif memohon, antara lain, relief dalam bentuk wang, perintah untuk menyediakan akaun, dan perintah untuk menyerahhak surat ikatan dokumen hartanah tersebut. Defendan-defendan menafikan apa-apa fraud atau pelanggaran amanah dan sebaliknya mendakwa bahawa mereka telah mentadbir harta pesaka si mati, yang tidak solven, sebaik

keupayaan mereka. Defendan-defendan pertama dan kedua juga bergantung kepada pembelaan had masa dan *laches*. Defendan-defendan ketiga dan keempat mendakwa bahawa tiada pakatan sulit antara mereka dan defendan-defendan pertama dan kedua dan bahawa tindakan plaintif-plaintif terhadap mereka telah luput masa. Defendan ketiga juga mendakwa bahawa dia merupakan pembeli bernilai bona fide Lot 290 dan 431.

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Diputuskan, menolak tuntutan plaintif-plaintif kecuali satu bahagian tanpa perintah untuk kos:

- (1) Tindakan-tindakan yang difailkan pada tahun 1994 dan 1995 adalah berkaitan transaksi-transaksi yang berlaku dalam tahun 1970an. Walau bagaimanapun, di bawah s 22 Akta tersebut, peraturan berhubung had masa tidak melindungi apa-apa fraud atau pelanggaran fraud dan dalam kes di mana pemegang-pemegang amanah telah memiliki hartanah atas amanah tersebut. Berdasarkan tempoh masa dalam tindakan ini, plaintif-plaintif jelas di luar had masa untuk apa-apa tindakan berkaitan hartanah atas amanah di mana tiada fraud dan di mana hartanah atas amanah bukan milik pemegang-pemegang amanah. Selanjutnya, defendan-defendan ketiga dan keempat juga dikecualikan daripada liabiliti di bawah s 22(2) Akta tersebut (lihat perenggan 18–19 & 22).
- (2) Mahkamah ini mendapati bahawa di bawah keadaan kes ini, tuntutan plaintif untuk perintah bagi menyediakan akaun telah luput masa menurut s 6(2) Akta tersebut (lihat perenggan 23).
- (3) Dakwaan-dakwaan plaintif-plaintif bahawa defendan-defendan pertama dan kedua telah berpakat sulit dengan defendan-defendan ketiga dan keempat untuk menjual Lot-Lot 287 dan 288 di bawah nilai pasaran adalah tanpa merit dan patut gagal. Hujah plaintif-plaintif bahawa Lot-Lot 287 dan 288 akan bernilai lebih kurang RM100,000 setiap satu telah gagal untuk mengambil kira sekatan-sekatan termasuklah kaveat-kaveat yang dimasukkan oleh pelbagai pihak ke atas lot-lot tersebut. Oleh itu, nilai setiap lot mungkin lebih kurang dan transaksi jualan tersebut bukan suatu yang palsu. Selanjutnya, fakta bahawa defendan-defendan ketiga dan keempat adalah kawan rapat defendan kedua tidak menjadikan mereka calon atau proksi tanpa kewujudan apa-apa bukti salah laku. Tiada juga keterangan pakat sulit dalam penerimaan keuntungan secara rahsia (lihat perenggan 35 & 44).
- (4) Berdasarkan fakta kes ini adalah jelas bahawa Lot 290 dan 461 dilanda pelbagai masalah dan dengan mengambil kira semua faktor-faktor tersebut adalah didapati bahawa defendan-defendan pertama dan kedua tidak mempunyai motif serong dalam memindah milik lot-lot tersebut kepada defendan ketiga. Plaintif-plaintif telah mendakwa bahawa defendan-defendan bertindak secara fraud tetapi fraud suatu perkara serius yang perlu dibuktikan melampaui keraguan munasabah.

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- A Mahkamah ini mendapati bahawa dalam semua keadaan, plaintif-plaintif telah gagal membuktikan fraud dan pelanggaran amanah berhubung pindah milik Lot 290 dan 461 kepada defendan ketiga patut diisytiharkan terbatal dan tidak sah kerana dokumen pindah milik itu tidak mencukupi atau tidak mempunyai merit. Oleh kerana
- B plaintif-plaintif telah mengemukakan keterangan bahawa pendaftaran lot-lot tersebut telah diperoleh melalui surat wakil kuasa yang telah luput mahkamah ini terbatas untuk memutuskan bahawa pindah milik Lot 290 dan 461 kepada defendan ketiga telah dilakukan melalui pindah milik yang tidak mencukupi atau tidak sah dan pindah milik tersebut dan
- C pendaftaran seterusnya dengan itu adalah tidak sah. Oleh demikian, jualan dan pindah milik Lot 290 dan 461 adalah disytiharkan terbatal dan tidak sah (lihat perenggan 54–55, 79 & 85).
- (5) Tuntutan plaintif-plaintif bahawa Lot 3 yang telah diperintahkan agar
- D dikembalikan kepada defendan kedua dan yang telah pun dipindah milik kepada defendan kedua sebagai pemilik mutlak dengan sah dimiliki oleh harta pusaka si mata dilihat tidak akan berlaku. Walaupun jika Lot 3 membentuk sebahagian daripada harta pusaka si mati ia masih akan dirampas oleh kerajaan kerana si mati telah gagal membayar cukai tanah. Dalam keadaan berikut, tiada merit dalam dakwaan plaintif-plaintif
- E berkaitan ini dan tuntutan ini patut gagal (lihat perenggan 58, 60–61).
- (6) Walaupun plaintif-plaintif telah membuat beberapa dakwaan wang diterima oleh defendan kedua, yang tidak diambil kira oleh defendan-defendan pertama dan kedua, mereka telah gagal memberikan
- F keterangan mencukupi berhubung pelanggaran amanah atau fraud bagi membuktikan dakwaan-dakwaan tersebut (lihat perenggan 62 & 66).]

Cases referred to

- Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, HC (refd)
- G *Ang Ee Lock v Sng Cheng Siong* [1948–49] MLJ Supp 24 (refd)
- Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22, FC (refd)
- Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301, FC (refd)
- H *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34, SC (refd)
- Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors* [2007] 5 MLJ 297, CA (refd)
- Green v Gaul* [2006] EWCA Civ 1124, CA (refd)
- Jamaliah bte Hj Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah bte Hj Ali) & Ors v Sivam a/l Munasamy & Anor* [1999] 5 MLJ 250, HC (refd)
- I *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (refd)
- Khoo Cheong Puay v The Overseas Chinese Banking Corporation Ltd, & Ors* [1935] MLJ 93 (refd)

- Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, SC (refd) **A**
- Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 (refd)
- M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, SC (refd)
- M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, SC (refd) **B**
- Manilal & Sons (M) Sdn Bhd v Pentadbir Tanah Daerah, Kulim & Anor* [1997] 3 MLJ 573, CA (refd)
- Pappa v Saminathan* [1975] 1 MLJ 263 (refd)
- Patel v Shah* [2005] EWCA Civ 157, CA (refd)
- PJTV Denson (M) Sdn Bhd & Anor v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, FC (refd) **C**
- Playing Cards (Malaysia) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182, FC (refd)
- Puran Singh v Kehar Singh; Bahadur Singh* [1939] MLJ Rep 71 (refd) **D**
- RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, FC (refd)
- Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98, CA (refd)
- Saminathan v Pappa* [1981] 1 MLJ 121, PC (refd)
- Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185, SC (refd) **E**
- Tan Ying Hong v Tan Sian San & Anor* [2010] 2 MLJ 1, FC (refd)
- United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, SC (refd) **F**
- United Malayan Banking Corporation Bhd v Syarikat Perumahan Lunas Sdn Bhd (No 2)* [1988] 3 MLJ 352b, HC (refd)
- Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, CA (refd)
- Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182, FC (refd) **G**
- Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC (refd)
- Legislation referred to** **H**
- Limitation Act 1953 ss 6, 6(2), 9, 22, 22(1), (2), 32
- National Land Code s 340, 340(2)(b), Form 14A
- Powers of Attorney Act 1949 s 5
- Probate and Administration Act 1959 s 60, 60(2)
- Trustee Act 1949 ss 15(2), 30(1), (9) **I**
- K Govindaraju (G Raju & Co) for the plaintiffs.*
- Vijaya Segaran (Fernandez & Selvarajah) for the first and second defendants.*
- M Mathialagan (Madhi, Param & Co) for the third and fourth defendants.*

A Harmindar Singh JC:

INTRODUCTION

B [1] One Ratnavale a/l Mahalingam ('Ratnavale') died on 9 April 1973. He left a will dated 10 February 1971 ('the will'). By this will, he bequeathed all his property to his wife, mother and six children. The first and second defendants ('D1 and D2') were named executors and trustees under the will. They are the younger brothers of Ratnavale. They extracted the grant of probate on 9 May 1974.

C [2] The plaintiffs in each action are the beneficiaries under the will. They are unhappy with the way that D1 and D2 have administered the assets and liabilities of Ratnavale's estate. They are alleging fraud and breach of trust. They are now seeking various orders from the court. The defendants deny any fraud or breach of trust. They claim the estate of Ratnavale was insolvent and was administered as best as they could.

D BACKGROUND

E [3] In view of the various issues raised, especially with regards to the question of limitation and laches, it becomes necessary to set out some factual background in these actions.

F [4] The proceedings were initially commenced in the Penang High Court as Civil Suit No 22–194 of 1994 with only Panchanath Ratnavale as the plaintiff against the four defendants on 23 June 1994. Thereafter, on 17 June 1995, the following, namely (1) Jeganathan Ratnavale; (2) Dr Mahalakshmi Ratnavale; **G** (3) Vetitivelu Annalakshmi; (4) Dr Jeyalakshmi Ratnavale and (5) Dr Jeyaratnam Ratnavale, filed similar proceedings under Penang High Court Civil Suit No 22–127–1995 against the same four defendants. On 5 November 1996, the Penang High Court granted an order by consent of the parties to consolidate the two actions. On 28 May 2001, upon the application of D1 and **H** D2, the chief justice directed that the matter be transferred to Ipoh High Court.

[5] At the Ipoh High Court, the two actions were given new case numbers as follows:

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- (a) CS No 22–194 of 1994 as CS No 22–111 of 2001; and
 - (b) CS No 22–127 of 1995 as CS No 22–122 of 2001.

[6] At the Ipoh High Court, the trial was fixed from 8 April 2002 to 10 April

2002. The trial proceeded with two witnesses but could not be concluded by 10 April 2002 and was adjourned. In the meantime, further amendments were made to the statement of claim on 13 August 2003, 21 February 2007, 26 June 2007 and 11 February 2011.

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[7] Meanwhile, on 26 October 2010, the third plaintiff in CS 22–122 of 2001, Vetivelu Annalakshmi ('Annalakshmi'), passed away and the fourth plaintiff in the same action, Dr Jeyalakshmi Ratnavale, was substituted in her place. Various applications were also filed and dealt with in respect of these actions. The matter was eventually fixed for trial from 21 November 2011 until 24 November 2011 which trial concluded on the later date.

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THE PLAINTIFFS' CLAIM

[8] The plaintiffs' claim is premised on the will of Ratnavale dated 10 February 1971. Paragraph 3 of the will states that after payment of debts etc all his property is to be bequeathed:

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unto my legally married wife ANNALAKSHMI, my mother Madam RATNAMMAL and all my six (6) children in whatever proportion my said trustee at their discretion shall choose to distribute.

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[9] The plaintiff in CS 22–111 of 2001 and the first, second, fourth and fifth plaintiffs in CS 22–122 of 2001 are the five children of Ratnavale. The sixth child of Ratnavale, Manorani, is not a party to these proceedings having migrated to Australia. The third plaintiff in CS 22–122 of 2001 is Annalakshmi, the legally married wife of Ratnavale. The fourth and fifth plaintiffs in CS 22–122 of 2001 are her children. Madam Fam Kim Moy ('PW3') is the mother of the other four children of Ratnavale. PW3 described herself as the second wife of Ratnavale but they were never legally married. To recap, Annalakshmi died on 26 October 2010 and is substituted by her daughter, the fourth plaintiff. For convenience, the parties in both suits will all be referred to as the plaintiffs.

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[10] The four defendants in each suit CS 22–111 of 2001 and CS 22–122 of 2001 are the same. D1 and D2 are the named executors and trustees under the will. Prior to Ratnavale's death, D1 and D2 were appointed Attorneys of Ratnavale under a power of attorney dated 22 March 1971 when Ratnavale fell ill. The third and fourth defendants ('D3 and D4') are acquaintances of D2.

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[11] The plaintiffs' claim against D1 and D2 is based on fraud and/or breach of trust. D3–D4 are charged with collusion with D1 and D2. Particulars of such fraud and/or breach of trust have been pleaded and will be dealt with shortly. Based on these causes of action, the plaintiffs have sought relief in the

A form of monetary judgment, an order to provide accounts, various declarations, an order for removal of D1 and D2 as executors and trustees and an order to deliver up title deeds.

B [12] In essence, the plaintiffs complain that although probate was granted on 9 May 1974, they have not been given or distributed their share as provided in the will. Their complaint in these actions is restricted to the following properties:

C (a) Lot No 287, SPK No 2271, Mukim and District of Kulim, Kedah ('Lot 287');

(b) Lot No 288, SP 49, Mukim and District of Kulim, Kedah ('Lot 288');

(c) Lot 290, SPK 1171, Mukim and District of Kulim, Kedah ('Lot 290');

D (d) Lot 461, SP 715, Mukim and District of Kulim, Kedah ('Lot 461'); and

(e) Lot 3, SP 1642, Mukim Sungai Petani, District of Kuala Muda, Kedah ('Lot 3').

E [13] There is also a further claim for monies received by D1 and D2 which are unaccounted for.

THE DEFENCE

F [14] D1 and D2 deny that they are guilty of fraud and/or breach of trust. They claim that they have discharged their duties and functions conscientiously, in good faith and in the best interest of the estate. They claim that they have taken steps to ascertain the assets and settle the liabilities of the estate. They had advanced and continued to advance their own monies to settle the various debts of Ratnavale, as well as expenditure such as quit rent and assessments, education expenses for Ratnavale's children, day to day family expenses, costs of litigation and their mother Madam Ratnammal's bankruptcy for which an agreement dated 18 March 1971 allowed reimbursement out of the assets of the said estate.

H [15] The defendants further claim that due to the lapse of time, exact recollection of the events that took place some 20 years ago is difficult and especially where there is also a lack of record of such events. D1 and D2 are also relying on the defence of limitation and laches. D3 and D4 claim that there is no collusion with D1 and D2 with regard to the transactions complained of. I They claim that they have genuinely assisted the family of Ratnavale. D3 also claims that she is a bona fide purchaser for value for Lots 290 and 461. D3 and D4 also contend that the plaintiffs' action is barred by s 9 of the Limitation Act 1953.

CAUSES OF ACTION, LIMITATION AND LACHES

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[16] The plaintiffs here pleaded fraud and/or breach of trust as their causes of action. However, in the particulars pleaded, common allegations of fraud and breach of trust are pleaded together. The duty of the court will be to consider if the particulars pleaded have been proven to establish the cause of action in fraud and/or breach of trust.

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[17] In this regard, the plaintiffs, I agree, are bound by the particulars pleaded. The courts have on various occasions emphasised the importance of pleadings. It is essential in the interest of justice that parties abide by their respective pleadings. The pleadings define the issues and inform the parties of the case they have to meet. Strict adherence to pleadings will invariably result in shorter trials and reduced costs. Any departure from a pleaded case is not permitted especially if this results in prejudice to the opponent. Parties are certainly not permitted to set up an entirely new case not set out in the pleadings (see *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188). For these reasons, it would only be fair and just for the instant matter to be considered on the pleadings, the law and the evidence adduced. Before dealing with the causes of action, it may be appropriate and convenient to deal first with the defence of limitation and laches.

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LIMITATION

[18] The matters raised by the plaintiffs in the instant case concern transactions which occurred in the 1970's. The instant actions were only filed in 1994 and 1995. So whatever limitation periods specified in ss 6 and 9 of the Limitation Act 1953 ('Limitation Act') have been exceeded.

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[19] The plaintiffs' only recourse to defeat the plea of limitation is s 22 of the Limitation Act which reads:

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- (1) No period of limitation prescribe by this Act shall apply to an action by a beneficiary under a trust, being an action —
 - (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

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- A (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
- B Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.
- C (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.
- D [20] To summarise, no period of limitation prescribed by the Limitation Act shall apply to an action by a beneficiary under a trust being an action in respect of any fraud or fraudulent breach of trust or to recover from the trustee, trust property or the proceeds thereof.
- E [21] There is however an important distinction between s 22(1) and s 22(2) of the Limitation Act which is relevant to the case before the court. This distinction was explained by the Court of Appeal in *Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors* [2007] 5 MLJ 297 as follows at p 305:
- F We do not share this view of the learned High Court judge for the following reasons: First, we found no conflict or inconsistency between s 22(1) and s 22(2) of the Act. Each of these subsections applies to different set of circumstances. Section 22(1) relates to a claim by a beneficiary: (a) 'in respect of any fraud or fraudulent breach of trust which the trustee was a party or privy; or (b) to recover from the trustee trust property or to proceeds thereof in the possession of the trustee, or previously received by the trustee converted to his use'. So under sub-s (a) of s 22(1), there must be the element of fraud or fraudulent breach of trust. And under sub-s (b) of s 22(1), the trust property must be in the possession of the trustee or he has in possession of the proceeds thereof. On the other hand, s 22(2) of the Act is only confined to a beneficiary's action 'to recover trust property or in respect of any breach of trust not being an action which a period of limitation is prescribed'. The recovery of trust property here must mean trust property which is no longer in the possession of the trustee since s 22(1)(a) of the Act has already catered for situation where the trust property is in the possession of the trustee. For recovery of trust property which is not in the possession of the trustee or for that matter any breach of trust would fall within s 22(2) of the Act, provided that the action so mounted by the beneficiary is not one of those causes of action or situation where a time limit is already prescribed by the Act to bring the action. If a time is so prescribed, then the prescribed period of limitation specified in the Act will apply. Otherwise, it will be six years from the date on which the action accrued. So from the above observation, the distinction
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between s 22(1) and s 22(2) of the Act is clear. There is no conflict or inconsistency between the two (per James Foong JCA (as he then was)).

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[22] The guiding principle behind s 22 of the Limitation Act is that the rules of limitation should not protect fraudulent breach of trust and the case where trustees have come into possession of trust property. In other words, and in each case, no limitation period applies. In the instant case, so far as the cause of action in fraud is concerned, the plaintiffs' claim is not defeated by limitation. However, the claim in breach of trust must be limited to trust property in the hands of the trustees namely D1 and D2. Any other situation will attract the limitation period of six years as provided in s 22(2) unless of course if it was an action for recovery of land where pursuant to s 9 of the Limitation Act, the action can be brought before the expiry of 12 years from the date on which the right of action accrues. Considering the time periods in the instant action as alluded to at the outset, the plaintiffs are clearly out of time for any action relating to trust property where there is no fraud and where the trust property is not with the trustees. Accordingly as well, D3 and D4 are exempted from liability under s 22(2) of the Limitation Act as even conceded by the plaintiffs' counsel.

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[23] On the action for accounts which is one of the reliefs sought, I agree with the defendants' contention that it is barred by virtue of s 6(2) of the Limitation Act. I am unable to accept the plaintiffs' proposition that as the accounts are still ongoing, the limitation period has not set in. The plaintiffs could and ought to have asked for accounts as far back as 1981 when one of the beneficiaries, Manorani, asked for them but did not pursue further. It is much too late to seek for them now.

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LACHES

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[24] Notwithstanding s 22 of the Limitation Act, the defence of laches is available to the plaintiff by virtue of s 32 of the same Act which states: 'Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.' D1 and D2 have pleaded that the delay on the part of the plaintiffs in commencing this action is inordinate and unforgiveable and prejudices D1 and D2.

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[25] The doctrine of laches was stated by the Privy Council as long ago as 1874 in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 as follows:

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Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not

- A waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two
- B circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.
- C
- D [26] This statement has been approved by our courts in several cases: *Ang Ee Lock v Sng Cheng Siong* [1948–49] MLJ Supp 24; *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371; *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98.
- E [27] In *Alfred Templeton & Ors*, Edgar Joseph Jr J (as he then was) alluded to the depiction of laches as ‘inaction with one’s eyes open’. His Lordship then referred to *Halsbury’s Laws of England* (3rd Ed), and stated:
- F Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff’s part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where
- G he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted.
- H [28] More recently, the English Court of Appeal in *Patel v Shah* [2005] EWCA Civ 157 and *Green v Gaul* [2006] EWCA Civ 1124 approved of incorporating a broad approach, namely, by ascertaining whether it would in all the circumstances be unconscionable in permitting a late claim to be enforced when considering the defences of laches, acquiescence and estoppel.
- I [29] In arguing that the instant action is barred by laches, learned counsel for the defendants referred to the cases of *M Ratnavale*, and *Saad Marwi*. In these two cases, a short period of delay of 14 months and 19 months respectively was held to be fatal.

[30] On the other hand, learned counsel for the plaintiffs urged the court to be guided by *Alfred Templeton*, where the careful research and observation of Edgar Joseph Jr (as he then was) on the subject merits full reproduction:

It is possible to point a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in *Burroughes v Abbott* — rectification of an instrument was granted after a delay of 12 years; in *Weld v Petrie* — the Court of Appeal held that a mortgagor's redemption suit was not barred by a delay of 26 years and in *Pickering v Lord Stamford*, it was held that after a delay of 35 years, a portion of testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific performance was granted by the High Court in *Fitzgerald v Masters*, 26 years after the cause of action arose and in *Bester v Perpetual Trustee & Co Ltd*, Street J rejected a defence of laches where the plaintiff waited for 20 years before commencing a suit to rescind a transaction on grounds of undue influence. There are many cases which indicate that mere delay is not a defence in equity. In 1795, in *Pickering v Lord Stamford*, Arden MR inclined to the view that delay in a situation where no statute of limitation applied, could have legal effect only if it amounted to a release implied from conduct or was coupled with detriment to the defendant or a third party.

In *Fitzgerald v Masters*, equitable relief was granted after an inordinate length of time had lapsed. On the point under discussion, Dixon CJ and Fullager J at p 443 held that there were no circumstances apart from delay for refusing relief thereby (and in my opinion correctly) holding that mere delay of itself cannot constitute laches. In *Fullwood v Fullwood* — Fry J held that lapse of time affords no bar in equity.

[31] Coming back to the instant action, and with these annotations in mind, I have come to the conclusion that the defence of laches cannot succeed for the following reasons. Although the plaintiffs' claim of family pressure and insufficient resources as a reason for their sluggishness in pursuing their rights may sound lame, I consider however that matters relating to the administration of an estate and trust property ought to be considered on a different footing and indeed upon a higher threshold analogous to the limitation rules with regards to trust property.

[32] Furthermore, I do not think the defendants are so seriously prejudiced that it becomes unconscionable for the plaintiffs to now proceed with their claim as the defendants still have in their possession sufficient documents as well as sufficient knowledge to answer the plaintiffs' claim. I do not also see how it could be said with any amount of conviction that the plaintiffs by their conduct or even neglect could have led the defendants to believe that there has been waiver of their rights.

[33] In the same breath I should also add that having sat on their rights for some time, it would also be unfair and unjust for the plaintiffs to now criticise the defendants for failing to recall stale events as well as for failing to produce

A documents which due to the lapse of time may fade or be lost as the case may be. To accede to such criticism would amount to the plaintiffs taking advantage of their own tardiness.

B [34] I now turn to the specific allegations of fraud and/or breach of trust. It may be convenient to deal with each of the properties or monies in issue and the allegations presented.

LOTS 287 AND 288

C [35] The complaint here is that D1 and D2 colluded with D3 and D4 to sell Lots 287 and 288 below market value. It was also pleaded that D3 and D4 were D2's nominee to enable D2 to purchase trust property. In other words, the sale transactions to D3 and D4 were a sham. It was further alleged that D2 secured secret profits from both D3 and D4 from the subsequent sale transaction of the said properties to Syarikat Perumahan Pegawai Kerajaan Sdn Bhd ('SPPK').

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E [36] In this regard, the evidence disclosed that Lots 287 and 288 were charged by Ratnavale to Public Bank Bhd Penang ('PBB') for overdraft facilities in respect of accounts 1-415 and 1-446 where the sums owing were RM52,057.87 and RM57,654.80 as at 28 April 1973. Lot 287 was transferred to D3 on 8 August 1974 for RM70,000 and Lot 288 was transferred to D4 for RM70,000 on 22 October 1975. These Lots were subsequently sold by D3 and D4 by a settlement agreement with SPPK dated 3 July 1987 for the sums of RM844,361.35 for each lot. So was there fraud or breach of trust as asserted by the plaintiffs?

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G [37] In relation to fraud, Raja Azlan Shah CJ (as His Royal Highness then was) observed as follows in *PJTV Denson (M) Sdn Bhd & Anor v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 at p 138:

H Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate;' but "fraud" ... implies a willful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled'. (per Romily MR in *Green v Nixon*). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd*, it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...'

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[38] As allegations of fraud are extremely serious in that they involve elements of dishonesty which connote criminality in essence, they do not attract the usual standard of proof in civil proceedings, that is, on a balance of

probabilities. The standard of proof required where fraud is alleged is the criminal standard of proof beyond reasonable doubt (*Saminathan v Pappa* [1981] 1 MLJ 121; *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34; *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229; *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301). For good measure, it has also been held that grave suspicion is no proof of fraud (*M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371; *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487). It may therefore prove to be a formidable task to establish fraud as opposed to say forgery which, though a species of fraud, needs only to be proved on a balance of probabilities (*United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182).

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[39] Turning now to breach of trust, in *Breaches of Trust in Singapore and Malaysia* by WJM Ricquier and Stanley Yeo (1984), the learned authors have defined what constitutes breach of trust as follows (at pp 12–13):

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The first issue to consider is, what constitutes breach of trust? It is generally accepted that any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust. So, a trustee can be liable for positive acts, such as investments that are unauthorized by the Trustees Act or the trust instrument, or for omissions, such as failure to invest trust property at all. Liability does not depend on fault or even negligence.

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[40] In *Malaysian Trust Law* by Mary George, the learned author characterises the duties of trustees as follows (at para 5.3.2):

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Generally the trustee has to act in a fiduciary capacity which simply means putting the interests of the beneficiaries first. The specific duties of a trustee include those which relate to holding and controlling trust property, complying with the terms of the trust, acting prudently, making enquiries on acceptance of trust, monitoring affairs of underlying companies, investing trust funds properly, acting personally, impartially and unanimously, acting for the benefit of beneficiaries, keeping accounts, records and providing information. They are also under a duty not to compete with the trust and not to purchase trust assets.

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H

[41] In *Todd & Wilson's Textbook on Trust*, (8th Ed), the learned authors set out the general principles governing the duties of trustees towards beneficiaries as follows (at p 376):

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Although the ultimate benefit under a trust goes to the beneficiaries the trustees are concerned not only with their wishes, but also with those expressed by the settlor in the creation of the trust. There is therefore no general principle which permits the beneficiaries to control the way in which the trustees exercise their discretions. Were it otherwise, the trustees would be hopelessly handicapped in fulfilling their overriding duty towards the thrust as a whole and the court will never compel the

- A trustees to act under orders from the beneficiaries where a power or discretion has been entrusted to the trustees alone. This will hold as long as the trust continues, although if the beneficiaries collectively wish they can bring the trust to an end and resettlement the property on any terms they wish, under the *Saunders v Vautier* doctrine (see further chapter 17).
- B *Tempest v Lord Camoys* (1882) 21 Ch D 571 shows the position while the trust continues. The beneficiaries desired the trust to purchase an estate but one of the trustees objected. Jessel MR refused to interfere with that trustee's bona fide decision. Strictly, the trustees are under no obligation even to consult with the beneficiaries as to how a power or discretion should be exercised, although of course they will often do so in practice.
- C

- [42] Coming back to the facts in the instant case, there was a valuation report from Messrs Jones Lang Wootton dated 16 August 1977 for Lot 287 which report stated that the market value of Lot 287 free from all encumbrances was RM80,000 and the forced sale value was RM64,000. Lot 288 was adjacent to Lot 287 and would have a similar value.
- D

- [43] The plaintiffs, on the other hand, appear to rely on the valuation by the Valuation Department, Kedah on 9 April 1973 at RM341,000 for Lots 287, 288, 290 and 461. By simple arithmetic, the plaintiffs contend that Lots 287 and 288 would be worth about RM100,000 each.
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- [44] It must however be noted that the valuation here did not take into account the many encumbrances including caveats lodged by various parties on Lots 287 and 288. The value in each case would have been less. In any event, there must be a gross undervalue before any allegation of bad faith can be attributed and sustained (*Khoo Cheong Puay v The Overseas Chinese Banking Corporation Ltd, & Ors* [1935] MLJ 93). By any measure, the sale price seemed fair as it would have been close to the market value if not below. I am therefore unable to understand, by any stretch, how the sale transaction was a sham. The fact that D3 and D4 were close friends of D2 does not make them nominees or proxies in the absence of any proof of wrongdoing. There must also be evidence of collusion in the receipt of secret profits. There was no such evidence in this case. The allegations of the plaintiff in this regard are therefore without merit and must fail.
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- G
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LOTS 290 AND 461

- I [45] The allegation in the pleadings is that these two lots were transferred in breach of trust or fraudulently transferred in the name of D3 on 13 May 1992. The particulars provided for such breach of trust or fraud are not clear but it appears that all parties here proceeded on the footing that the allegations in respect of Lots 287 and 288 also apply to Lots 290 and 461.

[46] The background as to how D3 came to acquire these two Lots is as follows. Lots 290 and 461 were charged to Sim Lim Finance. To recall, D1 and D2 had a valid power of attorney dated 22 March 1971 to manage the affairs of Ratnavale. Because of default in payment, Sim Lim Finance had planned to auction these Lots. What D1 and D2 did was to request D3 to redeem these Lots from Sim Lim Finance. This is evidenced by a letter dated 27 February 1973 which appears as follows:

Dear Dr. Majumder,

27th February, 1973

Re: Penang High Court 'OS 23/73'

Auction of Land: 1) SIF: 1171 Lot 290 Mukim of Kulim, Kedah

2) SF 715 Portion No. 461 Mukim of Kulim, Kedah

Charged to Sim Lim Finance Company

Further to our discussion we beg to inform you that Messrs Lee Kok Liong & Co are instituting proceedings in the High Court of Penang to auction the pieces of land that were charged to them as Mr. M. Ratnavale had defaulted the repayment of loan to Sim Lim Finance Company.

We regret that the monies you had in the past loaned to Dr. M. Mahadevan have not been settled as arranged. We hope to do so soon. However, we would appreciate if you could kindly initiate legal steps to stay the auction and redeem the property. Kindly pay off all monies due in full settlement to Sim Lim Finance Company and obtain discharge of the charge. At the rate the interest is escalating the amount of interest will exceed the capital borrowed and as things stand we are in no position to succour the property within the prescribe time.

We promise to repay you all monies due to you including all legal expenses incurred within three months of date. Should we be in no position to repay you all monies taken in the past we hereby promise that you could acquire the property in lieu of part settlement for the financial assistance that you have rendered us.

Thank you very much and please do not let us down as the properties auction is imminent.

Yours sincerely,

Sgd

RATNAVALE S/O MAHALINGAM

By his Attorney

Sgd

(Sandrasegara s/o Mahalingam)

RATNAVALE S/O MAHALINGAM

No.9,Jalan Hang Tuah, Ipoh,

A

By his Attorney

[47] What is significant in this letter is that:

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(a) auction proceedings were imminent;

(b) there is an admission that D3 had loaned monies in the past to D2 which have not been settled; and

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(c) there was a promise to repay all monies due within three months failing which D3 could acquire the said properties in lieu of part settlement for the financial assistance that was rendered to D1 and D2.

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[48] D3 then redeems the said lots from Sim Lim Finance by paying a sum of RM17,179.92. This was confirmed by the solicitor in an affidavit dated 28 December 1973. Subsequently, D1 and D2 failed to repay D3 within the prescribed time and D1 and D2 agreed to transfer the said Lots to D3. The transfer was however effected only in 1992 due to caveats and other proprietary rights asserted by numerous subpurchasers.

E

[49] Now the plaintiffs say that the RM17,179.92 paid by D3 was a paltry sum. They claim that Ratnavale had sufficient resources to redeem the said lots. In D1's letter to Ratnavale dated 29 January 1972, D1 suggested to Ratnavale to sell some London shares worth RM85,000–RM90,000 to redeem the said Lots from Sim Lim Finance.

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[50] In this respect, I think the right approach would be to determine if D1 and D2 had acted prudently and in good faith in disposing of the properties to D3. If they had done so, their decision ought not to be questioned by the court as no private individuals will agree to be executors or administrators if all their acts are later examined minutely and with the benefit of hindsight.

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[51] There was some evidence that Ratnavale had charged these lots to Sim Lim Finance for a loan of RM50,000. So it would be fair to assume that the lots were worth at least that much. As alluded to previously, the plaintiffs had relied on the valuation by the Kedah Valuation Department of the sum of RM341,000 in respect of Lots 287, 288, 290 and 461. Now if the plaintiffs claim that Lots 287 and 288 ought be valued at RM100,000 each not taking into account the encumbrances on the said lands, then Lots 290 and 461 would be valued at around RM141,000. This would of course again be without encumbrances and as the evidence later disclosed, Lots 290 and 461 had problems with caveats and numerous subpurchasers claiming property rights. The market value would then be much lower.

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[52] To recall, the letter dated 27 February 1973 was an admission by D1

and D2 that monies were owed to D3 quite apart from the RM17,179.92 that was eventually paid to Sim Lim Finance to redeem the said lots. I think there is ample evidence to suggest that D3 was owed in excess of RM100,000.

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[53] Apart from D3's oral testimony, there was evidence of the amount of RM100,000 being mentioned in the private caveat lodged by D3 as far back as 1975. The private caveat was lodged by D3 on the basis of an agreement to charge the lands as security for a loan of RM100,000 granted by her to D1 and D2. This fact was also noted in the Court of Appeal judgment in *Manilal & Sons (M) Sdn Bhd v Pentadbir Tanah Daerah, Kulim & Anor* [1997] 3 MLJ 573. The allegation by D3 that she was owed monies and which exceeded RM100,000 cannot be lightly dismissed as an afterthought. I therefore accept as a fact that she was owed these monies.

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[54] Now taking all these factors into account, I find that D1 and D2 were entitled to take the position that they had to repay the debt due to D3. I am therefore unable to accept that D1 and D2 had some oblique motive in dealing with these properties as they did much less accept that they had acted fraudulently. Fraud is a serious matter and, as observed earlier, must be proved beyond reasonable doubt as the courts have reiterated on many occasions. Even a grave suspicion is insufficient. The plaintiffs' assertion that D1 and D2 could have used other funds or their own funds to redeem Lots 290 and 461 is speculation at best. It also does not take into account the fact that D3's debt also had to be repaid. Again, the fact that D3 was a close friend of D2 does not by itself make her a nominee or proxy in the absence of any proof of wrongdoing.

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[55] As it turned out, Lots 290 and 461 were beset with countless problems. There was much litigation due to the claim by Manilal & Sons and although it was only in 1986 that D1 and D2 executed the transfer of these Lots to D3, the transfer only materialised in 1992. In all the circumstances, the plaintiffs have failed to prove allegations of fraud and breach of trust and their claim in this regard cannot succeed.

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LOT 3

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[56] The complaint in the pleadings is that D2's act in subsequently transferring or causing Lot 3 to be transferred to his personal name as owner was in breach of trust. The plaintiff averred that D2 falsely and fraudulently omitted Lot 3 from the list of assets of Ratnavale by claiming the same was confiscated by the state authority. They claim that D2 ought to transfer Lot 3 to himself as trustee and not absolute owner.

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[57] The facts which give rise to this complaint can be stated as follows. Lot

A 3 was owned by Sungai Tukang Rubber Estate Company ('Sungai Tukang Company'). Ratnavale had an interest in this Sungai Tukang Company. In around August 1970, there were arrears on the rent on the said land which were not settled. Lot 3 was then forfeited by the Kedah State Government by gazette notification dated 9 September 1971. This was during Ratnavale's lifetime.

B

[58] D2 claims that Ratnavale's interest in the Sungai Tukang Company came from joint family funds of the male members of the Mahalingam family amounting to RM100,000. It was contended that Ratnavale held his interest in the Sungai Tukang Company for and on behalf of the male members of the Mahalingam family at that material time. It was further alleged that at a family meeting by members of the Mahalingam family, the beneficial interest in Lot 3 passed to D2. D2 then initiated court proceedings to appeal against the forfeiture. He was successful and the court ordered D2 to settle the outstanding quit rent. Lot 3 was then registered in the name of D2.

C

D

[59] Now the plaintiffs are claiming that no such family meeting took place and that Lot 3 rightfully belongs to the estate of Ratnavale. Now if the plaintiffs are right, it will mean that D1, D2, another brother Sivananthan and more significantly their mother Madam Ratnammal have given false evidence in their affidavits. It will also mean that the judge who ordered the forfeited land to be returned to D2 was wrong in his judgment.

E

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[60] I think the evidence shows on a balance that the family meeting did indeed take place. The plaintiffs, except for Annalakshmi, could not possibly have personal knowledge as they were much too young or they were overseas pursuing their education. In the final analysis, the affidavit of Madam Ratnammal, the matriarch of the family, could hardly be challenged by the plaintiffs. She was held in the highest regard and esteem by the plaintiffs and they cannot now say, as they must, that Madam Ratnammal had lied. Any suggestion that she could have been manipulated by D2 is unconvincing as she was by all accounts a strong-willed and aggressive woman. Furthermore, PW4 conceded that her grandmother would never do anything against the interest of her grandchildren. I also think it highly improbable that as far back as 1973, D2 had started his scheme to defraud his family members with his mother and his brothers as accomplices. I agree with the defendants that the plaintiffs' assertion in this connection appears farfetched and fanciful.

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[61] Even assuming for a moment that Lot 3 formed part of the estate of Ratnavale, then it would be a fair assumption that Lot 3 would have remained forfeited to the Government with little prospect of success in overturning the forfeiture as Ratnavale had failed to pay the arrears of quit rent. The plaintiffs would not be quarrelling about Lot 3 then. In the circumstances, I fail to see any merit in the plaintiffs' allegations in this regard. This claim must therefore

fail.

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OTHER ALLEGATIONS OF FRAUD/BREACH OF TRUST

[62] There are also other allegations of monies received by D2 but which are not accounted for. It was alleged in the particulars that D1 and D2 willfully failed to disclose the award of compensation for part acquisition of Lot 461 in the sum of RM235,403.21 received from the Pemungut Hasil Tanah Kedah which was paid through Messrs Mahadevi Nadchatiram & Partners on or before 26 January 1986. It was further alleged that D1 and D2 willfully failed to disclose the award of compensation for part acquisition of Lot 290 and Lot 461 in the sum of RM255,274.29 received from the Pemungut Hasil Tanah Kedah from 1986 to on or before 18 April 2000.

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[63] The factual background to these assertions is that the Kedah State Government had acquired portions of land on Lots 290 and 461 to build a water attachment area. Legal proceedings were instituted by D2 to obtain an increased sum which D2 says were on behalf of D3 who was legally and beneficially entitled to the compensation monies by reason of the agreement dated 27 February 1973. So I cannot see how there was breach of trust much less fraud.

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[64] In any event, the allegations were based on letters by two firms of solicitors and I agree with the defendants' contention that these letters alone cannot amount to proof that D1 and D2 had actually received the monies. And I think the same can be said in respect of the sum of RM2,948,070.62 deposited at the Alor Setar High Court. This sum was also an award of compensation in respect of Lots 290 and 461.

F

[65] There is a further allegation of a sum of RM167,494.64 paid to D2 by the receiver of the Sitiawan Estate Syndicate between 1 January 1970 and 30 June 1997. Again the only basis for saying so is a letter written by solicitors to the plaintiffs solicitors. I do not think this constitutes sufficient evidence of payment to either D1 or D2.

G

[66] There was much criticism of the failure by D1 and D2 to explain these transactions. As I had indicated before, such criticism is unjustified as to do so now would mean the plaintiffs using their own indolence in bringing this claim as a means to attack the defendants. In the result, I hold that the plaintiffs have failed to provide sufficient evidence of breach of trust or fraud to prove their allegations in this claim.

H

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FURTHER FINDINGS

[67] Much evidence was also elicited concerning the Mahalingam and

- A Ratnavale family to suggest that there was fraud or breach of trust. My impression of the evidence was quite the opposite. Madam Ratnammal, who by all accounts was a strong-willed woman and matriarch of the family, would have been active in the affairs of the family and would certainly not allow D1 and D2 to act improperly and especially against the interests of her grandchildren. The plaintiffs cannot but concede that their welfare has been taken care of since Ratnavale's death right up to their education to a large extent by Madam Ratnammal. This I think lends credence to the assertions of D1 and D2 that they had all times acted in good faith.
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- C [68] I think it is also important to recall that D1 and D2 were operating what is termed as a discretionary trust. This was because D1 and D2 as executors and trustees were given the power and discretion to distribute the assets of Ratnavale after payment of debts and expenses 'in whatever proportion my said trustees at their discretion shall chose to distribute'. In the *Law of Trust* by JG Riddall, (6th Ed), discretionary trust is defined as follows (at p 283):
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- A discretionary trust is one under which discretion is conferred by the settlor on the trustees to decide which member or members of a class of beneficiaries should be entitled to the trust property ...
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- The terms of a discretionary trust may give trustees discretion not only as to which beneficiary or beneficiaries should take, but also as to whether to make any distribution of trust property (capital or income as the case may be) at all ...
- F
- A beneficiary who receives nothing under the trust has no grounds for attacking the trustees' exercise of their discretion unless he can show that the trustees have acted capriciously (eg if they selected beneficiaries according to their height or complexion), or corruptly or otherwise in bad faith. If the trustees have acted in good faith then the court will not interfere with their decision.
- G [69] It was therefore the case that D1 and D2 were given a wide discretion or latitude in the distribution of trust property. They could have given all the assets to Madam Ratnammal with paltry sums to the rest if they had thought it fit. That would still be in accordance with the Will and Ratnavale's wishes. Their only duty was not to act capriciously but in good faith at all times.
- H
- [70] Another piece of evidence adduced at the trial was an agreement dated 18 March 1971. This agreement came about because Ratnavale was seriously ill in hospital and D1 and D2, then already attorneys for Ratnavale, were trying to discover the assets and liabilities of Ratnavale. The parties to this agreement were D1 and D2, Madam Ratnammal, Annalakshmi, and Ratnavale represented by his attorneys, D1 and D2. The significance of this agreement was that it was agreed that D1 and D2 had advanced monies towards clearing up of the various debts of Ratnavale and that they are at liberty to be reimbursed from Ratnavale's assets all monies advanced by them.
- I

[71] Now considering the evidence in its entirety, D1 and D2 must have contributed to the maintenance of Madam Ratnammal and Annalakshmi and the maintenance and education of the children. I do not see the actions of D1 and D2 as being capricious, corrupt or otherwise in bad faith. There was evidence that Madam Ratnammal was a bankrupt and that Annalakshmi, by her own admission, was facing serious financial hardship. Surely the funds had to come from somewhere else. And the costs of education and costs of legal suits with respect to the estate of Ratnavale must have been considerable. These are all added factors which have led me to the conclusion that the defendants had not acted to the detriment of the plaintiffs and in violation of the trust.

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[72] Now that may appear to be the end of the matter, but it is not. There was a further contention about the validity of the transfer of Lots 290 and 461. The arguments were advanced as follows.

VALIDITY OF TRANSFER OF LOTS 290 AND 461 ON 13 MAY 1992

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[73] By their pleadings, the plaintiffs are also seeking an order that the sale and transfer of Lots 290 and 461 to D3 on 13 May 1992 be declared null and void and the Pentadbir Tanah Daerah, Kulim, Kedah be directed to give effect to the order. Although the seeking of this order appears in the pleadings, the reasons for it do not. The reasons were given at the trial. The crux of the complaint of the plaintiffs in this regard is that the Form 14A used to transfer the said Lots in 1986 was an insufficient or void instrument thereby making the registration on 13 May 1992 defeasible and liable to be set aside.

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[74] Now s 340(2)(b) of the National Land Code clearly provides that the title or interest of any such person or body for time being registered as a proprietor of any land shall not be indefeasible where registration was obtained by forgery, or by means of an insufficient or void instrument.

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[75] To recap the salient facts, Ratnavale granted a power of attorney to D1 and D2 on 22 March 1971. He later died on 9 April 1973. Pursuant to s 5 of the Powers of Attorney Act 1949, this power of attorney would have lapsed on 9 April 1973 upon the death of Ratnavale. However, D2 executed the Form 14A on 20 October 1986 in his capacity as Attorney for Ratnavale almost 15 years after it had lapsed.

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[76] As for D1, on 16 September 1976, he granted a power of attorney to D4 to carry out his duties as trustee pursuant to the grant of probate of Ratnavale. As D1 was going to be overseas for some period, he was allowed to do this by virtue of s 30(1) of the Trustee Act 1949. However, by virtue of s 30(9) of the Trustee Act 1949, such power of attorney is only operative for a period of three years after the date of execution. It would therefore appear that when D4

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- A executed the same Form 14A on 20 October 1986, her capacity as D1's attorney to act as trustee had expired some seven years before.

- B [77] I have considered the authorities of *Puran Singh v Kehar Singh; Bahadur Singh* [1939] MLJ Rep 71; *Jamaliah bte Hj Mahsudi (suing on her own behalf and as administratrix of the estate of Salamah bte Hj Ali) & Ors v Sivam all Munasamy & Anor* [1999] 5 MLJ 250; *Pappa v Saminathan* [1975] 1 MLJ 263; *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; *United Malayan Banking Corporation Bhd v Syarikat Perumahan Lunas Sdn Bhd (No 2)* [1988] 3 MLJ 352b, and it would appear that such defects in conveyance are not a mere irregularity and cannot provide a good title.

[78] In the case of *M & J Frozen Food Sdn Bhd*, Wan Yahya SCJ in delivering the judgment of the Supreme Court stated (at p 309):

- D The last issue is basically on the authority of the court to cancel the name of the purchaser which had by then become indefeasible by subsequent registration. The registration under ch 4 of Pt XVIII of the NLC does not necessarily make the title of the land entirely unimpeachable. Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.
- E A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had — *nemo dat quod non habet*. There are, however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of the NLC where a bona fide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument which was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility — see *Gibbs v Messer*. Under this principle, the registration of the insufficient or void instrument can be set aside.
- H It would appear, however, from the facts in this appeal that the challenge on the indefeasibility of the purchaser's interest could appropriately be dealt with under paras (b)–(c) of s 340(2) of the NLC.

- I [79] The courts have held consistently that registration obtained by means of an insufficient or void instrument, be that of an invalid or lapsed power of attorney or a failure to comply with an explicit statutory prohibition, is defeasible by virtue s 340(2)(b) of the NLC and can be set aside. In the instant action, the complaint really is for lack of capacity.

[80] In countering these arguments, the defendants raised several issues. Firstly, they say that the court ought not to consider these arguments as it was not pleaded that the transfer document was insufficient or void in the statement of claim. After careful reflection, I considered this contention by the defendants to be unpersuasive. There was already a prayer in the statement of claim of the plaintiffs for an order that the sale and transfer of Lots 290 and 461 to D3 on 13 May 1992 be declared null and void. This ought to have alerted the defendants. Although the issue raised was essentially a point of law, material facts giving rise to this point of law would have been helpful but I think not fatal. Nevertheless, it is also plain that the defendants were not taken by surprise by the plaintiffs' position as an earlier attempt to amend the statement of claim to provide such material facts was aborted in view of the defendants' own stand that a point of law need not be pleaded. The defendants cannot now say that they have been taken by surprise and worse still, take advantage of it (*Playing Cards (Malaysia) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182; *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185).

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[81] The second issue raised by the defendants in response was that D3 was a purchaser in good faith and for valuable consideration. However, in light of the recent Federal Court decision in *Tan Ying Hong v Tan Sian San & Anor* [2010] 2 MLJ 1, this argument no longer has any force. The notion of immediate indefeasibility under s 340 of the NLC is now dead and buried with deferred indefeasibility resurrected instead. To restate in simple terms, indefeasibility can be rebutted by establishing fraud, or establishing that registration was obtained by use of an insufficient or void instrument or establishing that the title or interest was unlawfully acquired. It is only subsequent acquirers of title or interest in the land who may acquire indefeasibility as long as they can show that the title or interest was obtained in good faith and for valuable consideration. This no doubt remains a variation of the common law principle that no man can give a better title than he had (*nemo dat quod non habet*).

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[82] The third and final contention in response by the defendants was the proposition that s 60(2) of the Probate and Administration Act 1959 ('the Act') puts this issue beyond any doubt. The said s 60 reads:

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60 Power of personal representative to dispose of property

- (1) In dealing with the property of the deceased his personal representative shall comply with this section.
- (2) Unless the Court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased; and subject as aforesaid, where there are several personal representatives the powers of all may, in

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A the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.

- (3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section:

B Provided that an executor may dispose of any property notwithstanding any restriction so imposed, if he does so in accordance with an order of the Court.

- (4) An administrator may not, without the previous permission of the Court

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(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

- D (5) Nothing in this section shall affect section 15(2) of the Trustee Act 1949.

- (6) The disposal of property by a personal representative in contravention of this section shall be voidable at the instance of any other person interested in the property.

E [83] The defendants are contending that by virtue of s 60(2) of the Act, the power of disposal of immovable property was exercisable by D2 alone. They further contended that in the transfer form, the consideration was stated as 'Menurut Grant of Probate Petition No. 449/1973'. As such, D2 was acting as an executor and the mistake in the transfer form was a mere irregularity.

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G [84] I think, with respect, these contentions cannot be sustained. Although s 60(2) of the Act allows one personal representative to act for all, this can only be with the concurrence or consent of the others. Any other construction would render s 60(2) of the Act meaningless. One personal representative cannot act alone unless the others are with him or her. In any event, this was not the case in the instant action. D2 was not purporting to exercise his power on behalf of the other personal representative, D1. They were exercising their powers separately.

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I [85] In the upshot, I am constrained to hold that the transfer of Lots 290 and 461 to D3 was done by means of an insufficient and/or void instrument and such transfer and subsequent registration was therefore invalid.

CONCLUSION

[86] In the circumstances, and for the reasons I have stated, the

plaintiffs claim against all the defendants is dismissed except for the claim set out in para 14(iv) of re re re re re amended statement of claim which is allowed. Accordingly, the sale and transfer of property known as Lot No 290 and Lot 461 Mukim and District of Kulim to D3 on 13 May 1992 is declared null and void. Since there has been some measure of success by each party, I think it is appropriate that there be no order as to costs.

Plaintiffs' claim dismissed except for one part with no order as to costs.

Reported by Kohila Nesan

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